# Supreme Court of the United States

IN THE MATTER

OF

The Petition of THE CHRISTENSEN ENGINEERING COMPANY for a Writ of Mandamus to The United States Circuit Court of Appeals for the Second Circuit.

## BRIEF ON BEHALF OF RESPONDENT BY COUNSEL FOR DEFENDANT IN ERROR IN THE COURT BELOW.

### Statement.

This is an application for a writ of mandamus to the United States Circuit Court of Appeals for the Second Circuit, directing it to take jurisdiction and consider the merits of the petitioner's writ of error from the United States Circuit Court for the Southern District of New York to the Circuit Court of Appeals, to review an interlocutory order of the Circuit Court entered in an *equity* suit brought for the infringement of United States Letters Patent No. 481,134 to George A. Boyden for Valves for Air-Brakes, and holding that the petitioner had disobeyed an *interlocutory* order of the Circuit Court granting a *preliminary* injunction restraining the petitioner from infringing claim 2 of the said letters patent, and had violated the *preliminary* injunction granted thereunder, and for such misconduct and contempt of Court, directing that the petitioner be fined the sum of $1,000, $500 of which was to be paid to the Clerk of the Court and $500 to the complainant in the suit, which writ of error the Court

of Appeals dismissed for lack of jurisdiction to review the same.

The order in question and all the proceedings for contempt were entitled in the suit.

After the contempt order was entered, an *interlocutory* decree sustaining the said claim 2, and also claims 4 and 11 of the patent, and granting a perpetual injunction and an accounting, with a reference to a Master, was made and entered.

On an appeal from the said *interlocutory* decree, the Circuit Court of Appeals sustained claims 4 and 11, but was inclined to hold that the structure of claim 2 was identical with the structure of claim 11, but on rehearing the Circuit Court of Appeals considered this view of claim 2 erroneous, and was of the opinion that such claim could be held valid and distinguished from claims 4 and 11, and gave the petitioner the right to submit briefs on this question. This the petitioner has done, and the Court of Appeals now has the question under advisement.*

The proceedings on the accounting have not been had, and no *final* decree has as yet been entered in the suit.

## The Question Before This Court.

The jurisdiction of the respondent to review the order of the Circuit Court could only exist on the theory that it was conveyed by Section 6 of the Act of March 3, 1891. That act conferred on the Courts of Appeals the right

" to review by appeal or writ of error final decisions in the District Courts and existing Circuit Courts in all cases other than those provided for in the preceding section of this act *(i. e.*, providing for direct appeals to this Court), unless otherwise provided by law."

The petitioner is understood to contend that the order fining for contempt of a preliminary injunction is a " final decision " in a criminal case.

* Since the above was written the Court of Appeals has adjudicated the said claim 2 not infringed

## I.

**The order in question was not such a final judgment in a criminal case as could be reviewed by the respondent.**

The power of every superior Court of record, to punish as for contempt, any disobedience of its orders, judgments or decrees, is, in the nature of things, inherent and essential and necessary to the exercise and enforcement of all its other powers (*United States vs. Hudson*, 7 Cranch, 32; *Anderson vs. Dunn*, 6 Wheat., 204; *in re Debs*, 158 U. S., 594). This power exists irrespective of statute, though the manner in which it may be exercised may be limited and regulated by statute (*Ex Parte Robinson*, 19 Wall., 506). And this power has been recognized and its exercise regulated by Congress (R. S., Sec. 725).

At common law, a Superior Court of competent jurisdiction whose authority was violated, or whose orders, judgments or decrees were disobeyed, was the exclusive judge of the contempt, and the exercise of its power to punish, therefore, if it had jurisdiction of the person and the offense, could not be ~~raised or~~ reviewed on appeal or writ of error. The reason for this rule is obvious.

"Every superior court of record, being at common law, the sole judge of contempts against its authority and dignity, it naturally results that the judgment of every such court, in cases of contempt is, at common law, *final* and *conclusive, and not reviewable by any other tribunal*, (which in other cases would lawfully exercise appellate jurisdiction), either on writ of error or appeal, unless *specially* authorized by statute."

*Rapalje on Contempts*, Sec. 141. (Italics ours.)

At common law every Superior Court is the *sole judge* in the last resort of contempts arising therein.

*In re Yates*, 4 Johns., 314.

In *Ex Parte Kearney*, 7 Wheaton, 36, where this Court declined to grant a writ of *habeas corpus* to relieve a party from punishment for contempt of Court, for refusing to answer certain questions in a criminal prosecution in the circuit court, Mr. Justice STORY quoted, with approval, the following from Justice BLACKSTONE in *Crosby's* case:

"All courts, by which I mean to include the two Houses of Parliament and the courts of Westminster Hall, can have no control of any matters of contempt. The sole adjudication of contempt and the punishment thereof belongs exclusively and without interfering, to each respective court. Infinite confusion and disorder would follow if courts could, by writs of *habeas corpus*, examine and determine the contempt of other courts.'

This expression was again quoted with approval by this Court in *New Orleans vs. Steamship Co.*, 20 Wall., 387.

In the matter of *Clinton B. Fisk*, 113 U. S., 713, a suit was brought in the Supreme Court for the State of New York against the petitioner to recover a sum of money alleged to have been obtained by false and fraudulent representations. In the course of the suit, an order was obtained for the examination of Fisk before trial. After other proceedings were had, Fisk appeared and submitted to a partial examination, answering some questions but declining to answer others. Pending one of the adjournments, the case was removed to the Circuit Court of the United States for the Southern District of New York. That Court then made an order continuing the examination before a Master. Fisk, on refusing to be sworn and declining to testify, was brought before the Court on proceedings to punish him for contempt in refusing to obey the Court's order. Subsequently he was held by the Circuit Court to be in contempt and fined $500, and committed to the custody of the marshal until it was paid. He thereupon made an application to this Court for a writ of *habeas corpus*.

It was contended that this Court had no power to review the order referred to. This Court said:

"There can be no doubt of the proposition, that the *exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error, or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the Court has authority to make them,* except through the Court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the Court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

"When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an *order which that court had no authority to make,* the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this Court, that when the proceeding for contempt in such a case results in *imprisonment,* this Court will, by its writ of *habeas corpus,* discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this Court will, in the language of the statute, make "*inquiry into the cause of the restraint of liberty*" (Sec. 752, R. S., italics ours).

In this case the Court held that the Circuit Court had no authority to make the orders for the examination of the petitioner, and was also without authority to enforce the orders by process for contempt, and therefore its order fining the petitioner for contempt and committing him to the custody of the marshal was without jurisdiction and void.

See, also, *ex parte* Savin, 131 U. S., 275; *In re Cuddy,* 131 U. S., 284.

In *ex parte* Tyler, 149 U. S., 164, this Court held that it had no jurisdiction to review on petition for *habeas corpus* an order of the Circuit Court imposing on a party a fine for contempt for violating an interlocutory injunction, and committing him until it was

paid, unless the order was utterly void for want of power to grant it.

In the unanimous opinion of this Court in the *Debs Case*, 158 U. S., 594, it was said:

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. *To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency*". (Italics ours.)

This is true, whether the question of the violation or disobedience of a court's order is submitted to another Court or tribunal in the first instance, or taken there for review on appeal, or by writ of error.

It has been urged that such a rule placed too much power in the hands of a single Judge, and caused too great inconvenience. But in *Ex Parte Kearney, supra*, Mr. Justice STORY said:

"Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere, and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not devised by courts of justice."

*In re Terry*, 128 U. S., 289, the Court, in denying a petition for a writ of *habeas corpus* in behalf of a party committed for contempt by a Circuit Court, said:

"It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused, and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts.

* * * * * *

"Whether the facts justified such punishment was for that court to determine under its solemn responsi-

bility to do justice, and to maintain its own dignity and authority. *In re* Chiles, 22 Wall., 157, 168. Its conclusion upon such facts, we repeat, is not, under the statutes regulating the jurisdiction of this court, open to inquiry or review in this collateral proceeding."

In neither *Ex parte Kearney, New Orleans vs. Steamship* or *In re Debs, supra*, did this Court hold that it had jurisdiction to review by writ of error or appeal proceedings for contempt, but the three cases are in harmony with the rule of law that the Court whose authority had been violated was the exclusive judge of the contempt. It was intimated in all these cases that the proceedings were not subject to re-examination by any other tribunal.

On the other hand, in *ex parte* Fisk, *supra*, it was distinctly stated that the exercise of the Circuit Court's power to punish for contempt of its orders, was not subject to review by a writ of error or appeal to this Court, nor was there in the federal system of jurisprudence any relief against such orders, where the Court had power to make them ; but that where the Court undertook to punish as for contempt a party refusing to obey an order which the Court had no authority to make, and the proceedings for contempt resulted in *imprisonment* of the party, the Court would, by its writ of *habeas corpus*, discharge the party.

It is submitted that the rule referred to in *Ex parte Fisk* still exists in the Federal Courts, in the absence of statute giving expressly the right to review, by writ of error or appeal, orders, judgments or decrees, *fining for contempt of court.*

There is no Act of Congress which in express terms gives the Appellate Courts of the United States jurisdiction to review such orders, judgments or decrees. It only grants jurisdiction " to review by appeal or writ of error final decisions " in all cases in which this Court has direct appellate jurisdiction, " *unless otherwise provided by law.*" It is believed that there is but

one instance in which this Court has reviewed, otherwise than by *habeas corpus* where the order violated was absolutely void, an order fining for contempt, and that was considered on appeal from a *final* decree, and was regarded as only *nominally* for contempt *(Worden vs. Searls, infra)*.

The object and policy of the acts of Congress in limiting appeals and writs of error to "final decisions," were to have all matters which were the subject of dispute decided by a single appeal so as to avoid delays and to save expense of successive appeals on different questions which might be all determined by a single appeal *(McLish* vs. *Roff*, 141 U. S., 661*)*.

The appellate powers of the Circuit Courts of Appeals of the United States are dependent entirely upon statute. They have no jurisdiction to review any proceedings of the lower courts, other than those specifically mentioned in the statute, and those that may reasonably be inferred from the language used in the statute, considered in the light of the objects and policy of the act.

It is submitted that if Congress intended to alter the ordinary provision of law by conferring power to review orders of attachment, or fine for contempt it would have done so by specific language.

In creating the Courts of Appeals, Congress continued the policy above referred to, of limiting the right of appeal, or review by writ of error; for the appellate jurisdiction of those courts is confined, by the act creating them, to the review, by writ of error or appeal, of *final* decisions, and interlocutory orders or decrees granting or continuing an injunction in an equity suit, and appointing a Receiver, in cases where there is an appeal from a *final* decree under the act. This act does not specifically or in terms give the Courts of Appeals jurisdiction to review, by appeal or writ of error, orders for contempt of court. On the contrary it merely gave Appellate jurisdiction from all "final decisions" not directly appealable to this Court, "unless otherwise provided by law."

The respondent, therefore, had no jurisdiction to review the order in question.

Some of the language used by this Court in deciding the cases of *Ex Parte Kearney* and *New Orleans vs. Steamship Co., supra*, has been construed into a finding that contempt of Court, in violating the Court's order in a civil suit, was a criminal offense, the proceedings to punish therefor a criminal prosecution, independent of the civil suit, and the order of punishment a final judgment in a criminal case, notwithstanding that all the proceedings are made and entitled in the civil suit.

We do not, however, understand that it has been so decided in connection with such orders as that involved in the present case.

Sometimes the Courts have divided contempts into two classes—one criminal and coercive, and the other civil and remedial—the former being conducted to vindicate the dignity of the Court and to punish for violation of its orders, and the latter to enforce the remedies of parties to the suit, and compel obedience to the orders and judgments made to protect the rights of such parties. This distinction, however, is not a true one, for in almost every case of contempt of Court the Court's directions or orders are disobeyed and violated, and in every case the punishment, whatever it may be, and even though it is for the benefit of a party to the action, is to vindicate the Court's authority.

In *State of Texas vs. Childs*, 22 Wall., 322, this Court, in referring to Sec. 725 of the Revised Statutes concerning punishments for contempt of Court, said:

"Such has always been the power of the courts both of common law and equity. The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for this disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform (Stimpson v. Putnam, 41 Vt., 238).

" In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him or shows that it is not in his power to do it."

The disobedience or the violation of the orders, judgments or decrees of the Courts of the United States in a civil suit, and at least of the order in question, is not a crime or an infamous crime, or a felony, under the laws of the United States. The proceeding to punish such contempts is not conducted by or on behalf of the United States, nor is it conducted for the purpose of punishing a violation of any of the criminal laws of the land. The proceeding is conducted by a private party, in a private suit, for the purpose of protecting and enforcing private rights and securing remedies given to private parties in civil actions, and which the civil courts have held they are entitled to, though it incidentally involves a vindication of the court's authority.

Mr. Justice BREWER, *In re Debs*, 158 U. S., 596, in giving expression to the unanimous opinion of this Court, said :

" In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to. * * * that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt ; *that such proceedings are not in execution of the criminal laws of the land ;* that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation ; * * * and finally, that the Circuit Court, having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in this or any other court."

It is, therefore, submitted that the violation of the order in question was not a crime or criminal offense, that the proceeding was not a criminal prosecution, and that the means or manner the Court adopted to

enforce its directions and vindicate its authority, was not a "final" decision or judgment (independent of the suit) in a criminal case.

Therefore, the respondent had no jurisdiction to review by writ of error, on the theory that the order in question, made in an *equity* suit, was a final decision in a criminal case.

This Court has held that an order punishing as for contempt, the violation of a *preliminary injunction* cannot, at least apart from the final decree, be reviewed by writ of error or appeal.

In *Hayes vs. Fischer*, 102 U. S., 121, it was said:

"Fischer, the defendant in error, brought a suit in *equity* in the Circuit Court of the United States for the Southern District of New York, to restrain Hayes, the plaintiff in error, from using a certain patented device. In this suit an *interlocutory injunction* was granted. Complaint having been made against Hayes for a violation of this injunction, proceedings were instituted against him for contempt, which resulted in an order by the court that he *pay the clerk* $1,389.99 as a fine, *and that he stand committed until the order was obeyed.* To reverse this order, Hayes sued out this writ of error, which Fischer now moves to dismiss, on the ground that such proceedings in the Circuit Court cannot be re-examined here.

"*If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by wait of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.*

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex Parte* Kearney, 7 Wheat., 38, and the rule then established was followed as late as New Orleans v. Steamship Co., 20 Wall., 387 (87 U. S., XXII., 354).

"It follows that we have no jurisdiction, and the motion to dismiss is, consequently, granted." (Italics ours.)

In this case the Court did not hold that the contempt was a criminal offense, nor that the order directing the

payment of a fine to the Clerk, and committing the party until paid, was a proceeding criminal in its nature and independent of the suit, but it seems to strongly indicate that the order of contempt for violating a *preliminary injunction* was a mere *interlocutory* order in a civil suit. The most that was intimated was that it possibly might be corrected on appeal from the *final* decree. That question is not now before the Court.

And *in re Chetwood*, 165 U. S., 443, and *Tinsley vs. Anderson*, 171 U. S., 101, this Court did not hold that contempts were crimes, nor that proceedings to punish, therefore, were criminal prosecutions and the order a judgment in a criminal case, but it did hold that such proceedings were not reviewable in this Court by appeal or writ of error, saying in the latter case "they may be reached by *certiorari in the absence of any other adequate remedy.*"

In the matter of *McKenzie*, 180 U. S., 546, this Court held that the writ of *habeas corpus* could not be used as a writ of error, and when applied for to relieve a party from restraint in punishment for contempt for violating an order of the Court, it would not be issued unless the order violated was absolutely void for want of jurisdiction.

Upon the petitions of *Watts* and *Sachs*, 190 U. S., 1, for *habeas corpus* and *certiorari*, this Court examined proceedings sentencing the petitioners to *imprisonment* for contempt of Court.

But in neither of these late cases has the Court held, that an order entered in a civil suit, fining a party for contempt of a previous order of the Court of which it had jurisdiction, was a judgment in a criminal case independent of the civil suit.

*Worden vs. Searls*, 121 U. S., 14, is the only case which has been found in which this Court has reviewed, either by writ of error or appeal, an order fining for contempt. In that case the lower Court had sustained the validity of the patent and had granted an injunction against its infringement. Cou-

tempt proceedings being brought for violation of the injunction, certain fines were imposed; one of $250, together with the costs of the contempt proceedings was to be paid *to the complainant* and by a later order a fine of $1,182 was to be paid to the Clerk of the Court and to be then paid over *to the complainant* to cover damages and costs of the contempt proceedings. The case being taken to this Court on an *appeal* from the *final* decree, the following language was used (7 Sup. Ct., 820):

"The appellants asked for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this Court cannot review the action of the circuit court in punishing a contempt committed by a violation of such injunction (1) because the proceedings were criminal in their character; (2) because the action of the circuit court is, by section 725 of the Revised Statutes, expressly made discretionary.

"All the proceedings which resulted in the imposition of the fines were taken and entitled in the suit.

* * * * * *

"These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case differs, therefore, from that of *Ex Parte* Kearney, 7 Wheat., 39.

* * * * * *

"So the fact in the present case that, though the proceedings were *nominally* those in contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to his expenses, distinguishes the case from that of New Orleans v. Steamship Co., 20 Wall., 387."

In the *Debs* case, this Court dismissed a writ of error from an order adjudging Debs in contempt of an *ex parte* and *preliminary* injunction on the ground that the order "was not a final judgment or decree" (158 U. S., 564, 573; 159 U. S., 251)

It would *seem* to follow from these decisions that an interlocutory order imposing a fine and directing that at least a portion of the same shall be paid to the complainant is regarded as part of what is done in the case, and while it might perhaps be reviewable on appeal from the final decree, if contempt proceedings are reviewable at all in cases where the Court has jurisdiction, it certainly is not a "final decision" or judgment in a criminal case, and it certainly is *not* reviewable on *writ of error*.

Such is the case here, and, that being so, it follows that the respondent was correct in dismissing the writ of error.

## II.

### The order in question was not in any sense a final judgment which could be reviewed by the respondent.

It is respectfully submitted that such an order as the present one, based on a mere *preliminary* injunction *pendente lite*, is not in any proper sense a *final* decision or decree or judgment of the Circuit Court, and hence was not reviewable as such by the respondent.

Such was the ruling of the respondent in *Sprague Co. vs. Nassau R. R.*, 95 F. R., 415, and of this Court in *ex parte Debs*.

It is conceded by the petitioner "that if the Circuit Court's order or judgment fining for contempt was not final, but intermediate and reviewable with a final decree which may hereafter be made in the suit, then petitioner's writ of error was properly dismissed" (Petitioner's Brief, page 2).

The order in question, which was entitled in the suit, held that the petitioner, by the sale of certain valves, after the issuing of the *preliminary* injunction, had infringed claim 2 of the patent in suit and had

disobeyed and violated the order for the *preliminary* injunction and the injunction issued thereunder, and for such misconduct the order directed the payment of the fine, partly to the Clerk and partly to the complainant.

Of course, on the proceedings for contempt, the same question of infringement which had been raised on the application for the *preliminary* injunction was not again considered, *de novo*, but the Court, in finding the petitioner for contempt, necessarily determined that the valves sold in contempt of the Court's order, and in violation of the complainant's rights, were substantially the same as, or substantially similar to, those it had previously determined were infringements.

The order adjudging the petitioner in contempt, therefore, was not a new proceeding, independent of the merits of the case, on which the final decree was to be based.

The order related to the merits of the case, in that it adjudged that the valves sold were similar to those previously held to be infringed, and therefore were infringements of claim 2.

It did not, however, finally determine the litigation between the parties on the merits, nor did it finally determine the question of infringement of claim 2. Its determination that the valves sold in contempt of the order for preliminary injunction were similar to the valves held to be infringements by the order for preliminary injunction, is not final, for the whole proceeding might have been reconsidered and redetermined otherwise by the same Court at final hearing as any order may be, at which stage of the suit all interlocutory and previous orders may be reconsidered.

*Fourniquet vs. Perkins*, 16 How., 82.
*Spill vs. Celluloid Co.*, 22 Blatch., 441, 450.

An order fining a party for contempt of a preliminary injunction is no more "final", in its nature, than many other orders that might be made in the progress of a case, and which dispose of a matter to which they specifically

relate, at least until the final hearing or final decree. It can hardly be said that all of these orders are reviewable by writ of error or appeal, merely because, as to the particular matter mentioned in the order, nothing further remains to be done.

An order directing a party or a witness to produce books, disposes of *that* matter, but it is hardly a "final" order from which an appeal can be taken.

An order setting aside service of process or deciding that process has been properly served, disposes of *that* matter, but the order is hardly an appealable one, except in connection with the final decree.

An order directing property to be turned over to a receiver was held by this Court not to be a final order.

*Brown vs. Swann*, 9 Peters, 1.
*Forgay vs. Conrad*, 6 How., 201.

In *Carr vs. Hoxie*, 13 Pet., 462, this Court held that a decree ordering a sale in execution of a previous decree was but a decree in execution of the original decree, and not a final decree in contemplation of the act of Congress from which an appeal lies.

An order directing money to be paid into Court was held by this Court not a final order.

*Pullman vs. Christian*, 6 How., 209.
*Lodge vs. Trevor*, 135 U. S., 232.

A decree dissolving an injunction is not a final decree.

*McCollum vs. Eager*, 2 How., 61.

In *McMicken vs. Perin*, 20 Howard, 133, a decree of the Circuit Court was affirmed by this Court on appeal. The cause was remanded to the Circuit Court to carry the decree into effect. After this an attachment was issued by the Court to compel the defendant to execute a conveyance directed by the decree. From the order for attachment the defendant appealed. This Court, in dismissing the appeal said :

"By the appeal from the former decree, the time within which the money was required to be paid was necessarily suspended. But that decree having been affirmed by the Supreme Court, and remanded to the

Circuit Court to be carried into effect, nothing further was required to be done. The tender and deposit of the money in court was all that Perin was required to do, to authorize the court to attach McMicken for a contempt, in refusing to make the conveyance. This involved no new question or decision, but was the ordinary means of enforcing the original decree. In no sense was this a final decree on which an appeal could be sustained. It is, in effect, the same as ordering an execution on a judgment at law, which had been affirmed on error, and remanded for execution to the Circuit Court. It has been held that an order of sale in execution of an original decree is not a final decree, on which an appeal will lie."

This Court has frequently held that an order, judgment or decree, for the purpose of review by appeal, or writ of error, must terminate the suit or litigation between the parties on the merits of the case, so that the whole purpose of the suit has been accomplished, and there is nothing left for the lower Court to do *in the case*, except to execute the judgment or decree.

*Bostwick vs. Brinckerhoff*, 106 U. S., 3.
*School District vs. Hall*, 106 U. S., 49.
*Railway Co. vs. Express Co.*, 108 U. S., 24.
*Moore vs. Fletcher*, 114 U. S., 127.

In considering what is a reviewable judgment or decree, the object of Congress giving the right to review should be considered, and that was to have all matters in dispute determined by a single review. Considered in the light of this policy, the order in question cannot be regarded as final.

It is submitted that the respondent had no jurisdiction to review the order in question, and that the writ of error was properly dismissed. Therefore, the application for mandamus should be dismissed with costs.

Respectfully submitted,
FREDERIC H. BETTS,
Of Counsel for Respondent and for Defendant in Error in the Court below.